

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.E., Appellant**

**and**

**TENNESSEE VALLEY AUTHORITY,  
BELLEFONTE TRAINING CENTER,  
Hollywood, AL, Employer**

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**Docket No. 17-1180  
Issued: December 18, 2017**

*Appearances:*

*Ronald K. Bruce, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On May 8, 2017 appellant, through counsel, filed a timely appeal from a March 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant met his burden of proof to modify a March 13, 2014 loss of wage-earning capacity (LWEC) determination.

On appeal counsel asserts that, because the March 13, 2014 LWEC was based on a temporary position created specifically for appellant and, as outlined by the Board in *A.J.*,<sup>3</sup> it was makeshift and temporary, such that the March 15, 2017 decision must be reversed.

## **FACTUAL HISTORY**

On October 16, 2003 appellant, then a 34-year-old lineman apprentice trainee, injured his right knee on October 15, 2003 while undergoing lineman training. He did not immediately stop work. OWCP accepted right cruciate ligament sprain. Additional conditions of tear of right medial meniscus and right lower leg primary osteoarthritis were also accepted.

On February 5, 2004 Dr. Kirk A. Fee, a Board-certified orthopedic surgeon, performed right knee arthroscopic surgery.<sup>4</sup> On March 11, 2008 he performed additional right knee surgery due to degenerative arthrosis. Appellant returned to modified duty on April 3, 2008.<sup>5</sup> Dr. Fee performed right knee total arthroplasty on March 31, 2009. On June 1, 2009 appellant filed a recurrence claim (Form CA-2a) and claims for compensation (Form CA-7) for compensation beginning that day.<sup>6</sup> He received the claimed compensation and was placed on the periodic compensation rolls effective October 25, 2009.

In February 2010, appellant was referred for vocational rehabilitation services.

In a September 9, 2011 report, Dr. Fee advised that appellant had recovered appropriately from his right total knee replacement. He provided permanent restrictions of no climbing, squatting, or kneeling, with a 50-pound weight restriction.

On September 26, 2011 the employing establishment offered appellant a modified position as a lineman apprentice, stating that it was a position for which it had a need. The offer provided a list of physical requirements.<sup>7</sup> Dr. Fee signed a release on September 28, 2011 indicating that appellant had the physical ability to perform the position. The offer indicated that appellant would not violate any of his restrictions. It was in the employing establishment's Muscle Shoals, Alabama, facility, and his duties would include sorting and inventory of material,

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<sup>3</sup> Docket No. 10-0619 (issued June 29, 2010).

<sup>4</sup> The record contains no claims for compensation at the time of this surgery. Appellant had left knee arthroscopic surgery, done by Dr. Fee, on June 30, 2006. A notation in the record indicates that he has a compensable left knee injury. Any claim regarding the left knee is not before the Board on this appeal.

<sup>5</sup> Appellant took sick leave from March 10 to April 3, 2008.

<sup>6</sup> Appellant did not claim compensation for the period March 31 to May 31, 2009.

<sup>7</sup> The physical requirement noted standing for four hours daily, sitting, bending, and twisting for two hours daily, walking, squatting, and kneeling for one hour, and no climbing, with a 10- to 20-pound lifting restriction.

working at a computer, and operating a forklift. The offer noted that appellant's job as a lineman apprentice gave him the knowledge needed to identify the types of material needed for construction jobs. Appellant accepted the offer on September 30, 2011 and returned to work at the Muscle Shoals facility on October 24, 2011.

In a March 14, 2012 report, Dr. Fee noted appellant's return to work. He advised that appellant could do intermittent sitting, walking, lifting, bending, and squatting with a lifting requirement of 10 to 20 pounds. Dr. Fee added that appellant could not push or pull significant weight, but could operate foot controls and operate a truck or tractor. He also advised that appellant had 25 percent permanent impairment of the right leg due to a total knee replacement.<sup>8</sup>

By decision dated March 13, 2014, OWCP determined that appellant's earnings in the position of lineman-apprentice, effective October 25, 2011, fairly and reasonably represented his wage-earning capacity. It noted that, since his current actual earnings were greater than his pay rate when disability recurred on March 31, 2009, he had no LWEC.

On April 13, 2015 the employing establishment notified OWCP that appellant had been terminated effective April 9, 2015. It attached April 9, 2015 correspondence sent to him indicating that a March 4, 2015 notice of proposed action had been finalized.

On April 17, 2015 appellant filed a recurrence claim. He indicated that the recurrence occurred on April 9, 2015 when management could no longer accommodate his restrictions. Appellant noted restrictions of no kneeling, squatting, climbing, or walking on uneven ground, and no prolonged standing, with a lifting restriction of 25 pounds. He described right and left knee pain, muscle spasm in the right leg and lower back, and nerve damage. The employing establishment indicated that on April 24, 2006 appellant also sustained an injury to his left knee, and that his modified position had restrictions of no bending, squatting, or ladder or pole climbing. Appellant also submitted claims for compensation beginning April 9, 2015.

By letter dated May 12, 2015, OWCP informed appellant that, as a formal LWEC was in place, in order to establish his disability claim, he would need to meet one of the criteria for modifying an LWEC. It described the criteria and advised him of the evidence he needed to provide.

In a June 1, 2015 report, Dr. Fee noted appellant's complaint of occasional laxity in his right knee. Physical examination demonstrated full extension and flexion with no signs or symptoms of problems or infections, and no gross ligamentous instability. Dr. Fee reviewed right knee x-rays which showed good position of the total knee components with excellent overall fixation. He diagnosed status post right total knee replacement and recommended activity as tolerated. Dr. Fee recommended a functional capacity evaluation (FCE) to determine appellant's physical capabilities.

By decision dated June 16, 2015, OWCP found that appellant submitted insufficient evidence establish a basis for modifying the March 23, 2014 LWEC.

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<sup>8</sup> Following review by its medical adviser who agreed with Dr. Fee's impairment evaluation, by decision dated April 24, 2012 OWCP granted appellant a schedule award for 25 percent permanent impairment of the right leg.

Appellant, through counsel, timely requested a hearing before a representative of OWCP's Branch of Hearings and Review. In support of the request, counsel forwarded an October 16, 2014 letter in which the employing establishment notified appellant that there were no reasonable accommodations available that would allow him to perform the essential functions of the duties of lineman apprentice. It noted that it had reviewed the position description and essential functions of the position, as well as appellant's current condition, the current work available, and the business needs of the organization.

A July 15, 2015 FCE, signed by Dr. Fee on July 23, 2015, demonstrated that appellant had difficulty completing or was unable to complete tasks requiring squatting, climbing, kneeling, and unilateral stance due to decreased strength and stability about the knees and subjective complaints of bilateral knee pain. He was assessed at a medium job level with a lifting ability of 50 pounds floor to waist and right and left carrying of 50 pounds.

At the hearing, held on February 16, 2016, appellant testified that his last day at work was in September 2014 and that he was paid through April 9, 2015. He indicated that, following the termination, he worked briefly as a forklift operator until the job ended. Counsel, citing the Board's decision in *A.J.*,<sup>9</sup> argued that the modified job appellant returned to in 2011 was erroneous and, therefore, the March 13, 2014 decision should be modified. He maintained that the job was makeshift and temporary because it was crafted to meet appellant's specific restrictions and was available only as long as the employing establishment could accommodate him.

By decision dated April 27, 2016, an OWCP hearing representative set aside the June 16, 2015 decision. She noted that, although appellant returned to a job in October 2011 which had an official title and formal position description, he did have strict restrictions. On remand, OWCP was to obtain additional information from the employing establishment as to whether the position on which the March 13, 2014 LWEC was based was a classified, permanent position, to be followed by a *de novo* decision.

On May 26, 2016 OWCP asked the employing establishment to comment regarding the 2011 job offer, specifically inquiring if the position was based on a classified, permanent, actual position and, if so, to provide an SF-50 or other documentation to verify this fact.

In a response dated May 31, 2016, the employing establishment replied in the affirmative that the position offered was permanent and that it was a *bona fide* position. A copy of the September 28, 2011 job description with attachments was included.

By decision dated June 13, 2016, OWCP denied modification of the March 13, 2014 LWEC decision. It found that, following review of the additional evidence submitted by the employing establishment, appellant did not meet any of the criteria for modifying a formal LWEC.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. At the hearing, held on February 8, 2017, counsel reiterated that the modified job

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<sup>9</sup> *Supra* note 3.

appellant returned to in 2011 was erroneous because it was makeshift and, therefore, the March 13, 2014 decision should be modified. He maintained that the job was makeshift because it was crafted to meet appellant's specific restrictions and was available only as long as the employing establishment could accommodate appellant, again referencing the Board's decision *A.J.*<sup>10</sup>

On March 13, 2017 OWCP's hearing representative telephoned the employing establishment which verified that the position appellant returned to was a permanent, regular position, noting that the job was still being performed at the employing establishment.

By decision dated March 15, 2017, OWCP's hearing representative found that appellant did not meet his burden of proof to modify the March 13, 2014 LWEC determination. He noted that the evidence of record did not establish that appellant had experienced a material change in the nature and extent of the employment-related condition or had been retrained or otherwise vocationally rehabilitated. The hearing representative also found that the evidence of record failed to support that the March 13, 2014 LWEC was erroneous. He affirmed the June 13, 2016 decision.

### **LEGAL PRECEDENT**

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.<sup>11</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.<sup>12</sup> OWCP procedures at section 2.1501 contain provisions regarding the modification of a formal LWEC.<sup>13</sup> The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.<sup>14</sup>

As the Board explained in *A.J.*,<sup>15</sup> a position that is considered an odd-lot or makeshift position designed for a claimant's particular needs is not appropriate for a wage-earning capacity determination. In that case, the Board discussed several factors that may support a finding that an offered position is makeshift in nature. These factors include: (1) the position did not have

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<sup>10</sup> *Id.*

<sup>11</sup> *Katherine T. Kreger*, 55 ECAB 633 (2004).

<sup>12</sup> *Sue A. Sedgwick*, 45 ECAB 211 (1993).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

<sup>14</sup> *Id.* at § 2.1501.3(a).

<sup>15</sup> *Supra* note 3.

an official title or formal position description; (2) there were strict limitations, such as five-pound lifting and no casing of mail, which indicated the claimant would not be able to secure a position in the community-at-large with such limited duties; (3) the claimant did not perform any meaningful tasks in the position; and (4) the job appeared to be temporary in nature.<sup>16</sup>

The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.<sup>17</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to modify the March 13, 2014 LWECA determination. In that decision, OWCP found that his earnings as a lineman-apprentice, effective October 25, 2011, fairly and reasonably represented his wage-earning capacity. It noted that, since his current actual earnings were greater than his pay rate when disability recurred on March 31, 2009, he had no LWECA.

On April 17, 2015 appellant filed a recurrence claim (Form CA-2a). He indicated that the recurrence occurred on April 9, 2015 when management could no longer accommodate his restrictions.

As a formal wage-earning capacity was in effect at the time of the claimed recurrence of total disability, appellant must show a basis for modification of that decision to be entitled to wage-loss compensation. He did not allege that the employment-related condition had materially changed or that he was retrained or otherwise vocationally rehabilitated. Rather, counsel, citing the Board's case *A.J.*, asserted that, because the March 13, 2014 LWECA was based on a temporary position created specifically for appellant, it was a makeshift position and, therefore, the March 15, 2017 decision was erroneous and must be reversed.

The Board finds no evidence in this case that the modified lineman apprentice position was makeshift pursuant to the relevant factors outlined in *A.J.* regarding a makeshift position. As to the first factor, the job offered appellant had an official title and a detailed job description. Although the job duties were modified to meet his physical restrictions,<sup>18</sup> the job description also included a list of the duties that he would perform and indicated that the employing establishment had a need for the position, and his job as a lineman apprentice gave him the knowledge needed to identify the types of material needed for construction jobs. On May 31, 2016 the employing establishment affirmatively indicated that the position offered was permanent, and certified that it was a *bona fide* position.

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<sup>16</sup> *Id.*

<sup>17</sup> *Jennifer Atkerson*, 55 ECAB 317 (2004).

<sup>18</sup> The job offer indicated that appellant would sort and inventory material, would work at a computer, and would operate a forklift. Dr. Fee noted on September 28, 2011 that appellant had the physical ability to perform the position.

As to the second *A.J.* factor, while the position provided restrictions of limited walking, squatting, and kneeling, and no climbing, with a 10- to 20-pound lifting restriction,<sup>19</sup> as noted,<sup>20</sup> the duties of the position were those that would be available in a local job market. Moreover, at the hearing, appellant testified that following his termination he had worked briefly as a forklift operator and only stopped because that job ended.

There is also no evidence that appellant performed tasks which were not meaningful in the modified position. On March 13, 2017 the employing establishment verified that the position he returned to was a permanent, regular position, noting that the job was still being performed at the employing establishment.

As to counsel's argument that the job was temporary, appellant performed the position for three years and the job is still being performed at the employing establishment.

As the record supports that OWCP followed proper procedures, the Board finds that the March 13, 2014 LWECD was proper.<sup>21</sup> There is, therefore, no basis to support that it should be modified.

Appellant may request modification of the LWECD determination, supported by new evidence or argument, at any time before OWCP.

### **CONCLUSION**

The Board finds that OWCP properly denied modification of appellant's wage-earning capacity determination.

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<sup>19</sup> *Supra* note 7.

<sup>20</sup> *Supra* note 18.

<sup>21</sup> *See A.D.*, Docket No. 14-0253 (issued June 6, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 15, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 18, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board